

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Affidavit

1-30-78

77-6188

To be argued by
SHERRY J. LEIWANT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6188

JESSE B. STEPHENS, on behalf of himself and all other
persons similarly situated,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA; UNITED STATES
POSTAL SERVICE; E. THEODORE KLASSEN,
in his capacity as Postmaster General of the United
States; UNITED STATES CIVIL SERVICE COM-
MISSION; ROBERT E. HAMPTON, in his capacity
as Chairman of the United States Civil Service Com-
mission; and ELMER B. STAATS in his capacity as
Comptroller General of the United States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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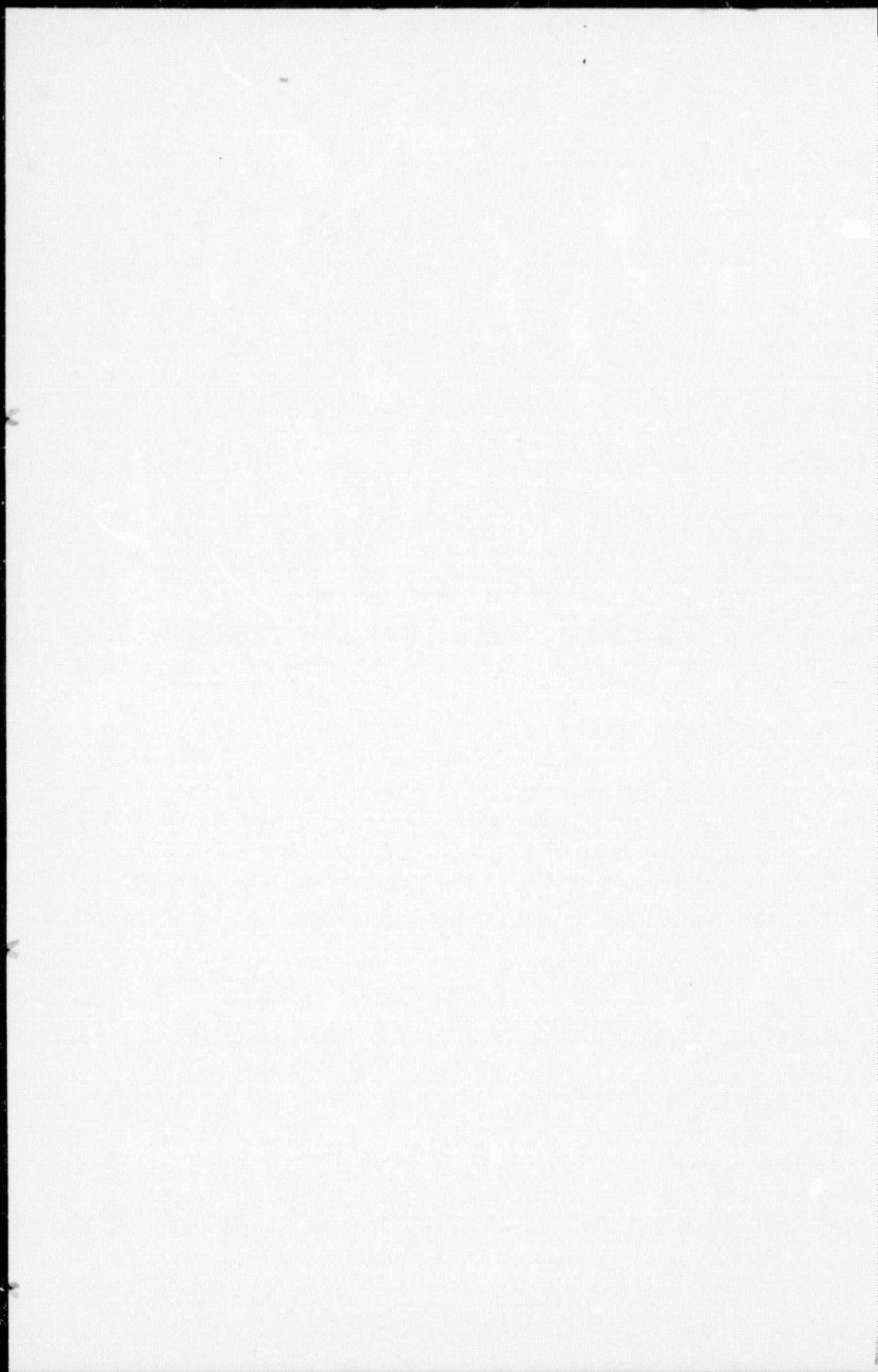
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JESSE B. STEPHENS, on behalf of himself and all other
persons similarly situated,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA; UNITED STATES POSTAL
SERVICE; E. THEODORE KLASSEN, in his capacity as
Postmaster General of the United States; UNITED
STATES CIVIL SERVICE COMMISSION; ROBERT E.
HAMPTON, in his capacity as Chairman of the United
States Civil Service Commission; and ELMER B.
STAATS in his capacity as Comptroller General of
the United States,

Defendants-Appellees.

BRIEF FOR THE UNITED STATES OF AMERICA

Issue Presented

Did the District Court abuse its discretion in refusing
to grant plaintiff relief from judgment pursuant to Rule
60(b)?

Statement of the Case

This is an appeal from an order of the District Court
denying plaintiff's Rule 60(b), F.R.Civ.P., motion to va-
cate a March 16, 1976 judgment of the District Court.

The background of the case can be summarized as follows. Jesse B. Stephens, a postal employee, was separated from the Postal Service on August 12, 1971 after approximately 23 years of service. (A-10) On or about November 7, 1971, Mr. Stephens applied for a refund in full of all retirement deductions during his years of service with the Post Office. On the form which he filled out to receive this lump sum benefit, notice was given that if the applicant had more than five years of service, he might be entitled to an annuity which would be forfeited by payment of the refund. (A-16) On May 24, 1972, plaintiff's counsel, the Legal Aid Society wrote to the United States Postal Service requesting payment of a lump sum retirement benefit which plaintiff alleged was owed to him along with certain other benefits.* On November 22, 1972, W. L. Schlappi of the Civil Service Commission wrote to plaintiff's attorneys advising them that the Postal Service had notified the Civil Service Commission that Mr. Stephens owed the Postal Service \$7,731.29 for theft of mail and that, accordingly, the Commission had paid Mr. Stephens' lump sum retirement benefit to the Postal Service in satisfaction of that debt. In that letter, plaintiff's attorneys were also advised that plaintiff had elected a lump sum retirement benefit and that, by doing so, he had ended his rights under the Civil Service Retirement System. (A-19) On April 11, 1973, Stephens brought an action against the United States, the Postal Service and the Civil Service Commission for recovery of this lump sum retirement benefit or, in the alternative, for a retirement annuity. The Government counterclaimed for the money it claimed was owed it by Stephens due to the theft of packages from the Postal Service.

* This fact is uncontested and appears in the Stipulation of Facts at ¶ 24, exhibit 17.

A trial *de novo* was held at which the issue of whether Stephens was entitled to a lump sum benefit or an annuity was raised. (A-20) The trial judge determined that the Government's debt to plaintiff was in the form of a lump sum benefit. (A-28) The judgment of the District Court entered on March 16, 1976, awarded Stephens the lump sum of \$7,533.00 and awarded the United States Postal Service \$7,620.00, the net effect being a judgment against plaintiff in the amount of \$87.00. (A-29)

An appeal was taken from that judgment by Stephens.* The focus of the appeal was whether the finding of the District Court that Stephens was guilty of the theft of eleven items of mail from the Postal Service was clearly erroneous. This Court held that the finding was clearly erroneous as to six of the parcels but was not clearly erroneous as to five of the parcels and remanded the case to the District Court "with directions to enter a net judgment in favor of Plaintiff-Appellant Stephens in the amount of \$3,074 plus costs." (A-6)

On February 15, 1977, plaintiff Stephens moved for an order vacating the March 16, 1976 judgment of the District Court. On March 11, 1977, plaintiff made another motion pursuant to Rules 60(b) and 56, F.R.Civ.P. for relief from the March 16, 1976 judgment and for summary judgment. (A-3) On June 27, 1977, plaintiff's February 15, 1971 motion was withdrawn. (A-3) On June 24, 1977 plaintiff's motion for relief from judgment and summary judgment was denied.** (A-35) On July 27,

* Plaintiff now contends that he could not raise the issue of his entitlement to an annuity in his original appeal because the Civil Service Commission was not a party to the appeal. However, as the Court had clearly awarded a lump sum benefit to plaintiff in its judgment, there was no bar to plaintiff raising the issue of his entitlement to an annuity when he appealed the District Court's judgment in 1976.

** Due to delay, this denial of motion was not filed until September 3, 1977.

1977, judgment was granted against the United States Postal Service in the net amount of \$3,074.00 plus plaintiff's costs. (See Addendum) On July 20, 1977, plaintiff filed a notice of taxation of costs in the amount of \$80.00. He refiled the Bill of Costs on the proper form on September 30, 1977 and costs were taxed against the Government.

ARGUMENT

The District Court Did Not Abuse Its Discretion In Refusing To Vacate Judgment Under Rule 60(b) With Respect To Its Award Of A Lump Sum Retirement Benefit To Plaintiff *

1. Under The Doctrine of "Law of the Case", Plaintiff Is Precluded From Raising The Issue Presented By This Appeal.

The doctrine of "law of the case" was recently outlined in *United States v. Ciraami*, 563 F.2d 26, 33 (2d Cir. 1977):

When an appellate court has once decided an issue, the trial court, at a later stage in the litigation, is under a duty to follow the appellate court's ruling on that issue, see *Munro v. Post*, 102 F.2d

* It would appear that this Court lacks jurisdiction over the present appeal. Plaintiff bases his contention that this appeal is timely on the belated September 9, 1977 docketing of Judge Griesa's, June 24, 1977 decision not to grant plaintiff relief from judgment. Plaintiff's motion for relief from the District Court's March 16, 1976 judgment was made on March 11, 1977, following the decision of this Court reversing in part and affirming in part the District Court's March 16, 1976 judgment. On July 21, 1977, the District Court entered judgment for plaintiff in the amount of \$3,074.00 plus costs pursuant

[Footnote continued on following page]

686, 688 (2d Cir. 1939), and is precluded from altering the appellate decision. *United States v. Fernandez*, 506 F.2d 1200, 1202-03 (2d Cir. 1974); 1B *Moore's Federal Practice* ¶ 0.404[10] (2d ed. rev. 1974).

In the present case, neither party briefed the issue of whether plaintiff should receive an annuity or a lump-sum benefit on the previous appeal. This court did, however, decide that a judgment for a lump-sum of \$3,074.00 should be entered in favor of plaintiff. The issue of the form of judgment was therefore decided, at least by implication, and had to be followed by the District Court.

The Amended Complaint in this action demanded a lump sum payment or, in the alternative, the annuity presently demanded on this, the second, appeal. At the trial of this action the issue of the form of payment was contested and the trial judge found that, in fact, plaintiff demanded a lump sum payment. A judgment was entered to that effect and plaintiff appealed from that judg-

to this Court's mandate. The judgment of July 21, 1977 effectively vacated the court's previous judgment of March 16, 1976. The entry of a new judgment on July 21, 1977 rendered plaintiff's motion for relief from the March 16, 1976 judgment moot as that judgment no longer had any force or effect.

Furthermore, as the entry of the July 21, 1977 judgment was, in effect, dispositive of plaintiff's motion pursuant to Rule 60(b), plaintiff's time to appeal should be held to run from July 21, 1977. Cf. *FTC v. Minneapolis-Honeywell Co.*, 344 U.S., 206, 211 (1952). Plaintiff's notice of appeal was not filed until November 7, 1977. In the alternative, plaintiff could have filed a new motion pursuant to Rule 60(b) for relief from the July 21, 1977 judgment. As plaintiff neither took a timely appeal from the July 21, 1977 judgment which was dispositive of his only filed Rule 60(b) motion, nor made another Rule 60(b) motion pertaining to the July 21, 1977 judgment, we submit that this Court lacks jurisdiction over the present appeal.

ment. Granted, plaintiff's brief in the first appeal focused on the judgment's assessment of damages against plaintiff. This Court, therefore, did not directly address itself to the issue of the method of payment. The Court's order modifying the trial court's judgment did, however, explicitly provide for an award of a lump sum. If this was an error, as apparently plaintiff contends, plaintiff never brought it to this Court's attention, even though Rule 40 of the Federal Rules of Appellate Procedure clearly provides the mechanism for a review if he believed that this Court overlooked or misapprehended plaintiff's position. See *United States v. Gargotto*, 510 F.2d 409 (6th Cir. 1974), *cert. denied*, 421 U.S. 987 (1975). Upon remand of this case to the District Court, however, the issue of the form of payment was raised. At that time, the law of the case doctrine precluded the trial court from departing from this Court's mandate.

This Court recently held in *United States v. Cirami*, *supra*, 564 F.2d at 33, that upon remand a trial court could not consider matters expressly or implicitly part of the decision of the Court of Appeals. Thus, the trial court was under a duty to follow this Court's decision, 563 F.2d at 32, and Judge Griesa did just that. The judgment cannot be reopened on plaintiff's claim which, in essence, is that he failed to put in his best case the first time around. 563 F.2d at 33.

2. Plaintiff Has Improperly Used Rule 60(b) of the Federal Rules of Civil Procedure to Raise The Issue Of His Entitlement To An Annuity.

It is well established that a motion under Rule 60(b) of the Federal Rules of Civil Procedure to relieve a party from a final judgment cannot be used as a substitute for a direct appeal. *Daily Mirror v. New York Daily News, Inc.*, 533 F.2d 53 (2d Cir.), *cert. denied*, 429 U.S. 862

(1976); *Rinieri v. News Syndicate Co.*, 385 F.2d 818, 822 (2d Cir. 1967); *Weiner v. Sherbourne Corp.*, 57 F.R.D. 636 (D. Vt. 1972); *Loucke v. United States*, 21 F.R.D. 305 (S.D.N.Y. 1957). Plaintiff is attempting to use Rule 60(b) as a substitute for a direct appeal of the district court's March 16, 1976 judgment to grant him a lump sum retirement benefit. Having failed to raise that issue by a timely appeal, plaintiff now seeks to rectify his error through a Rule 60(b) motion. As the case law makes clear, this is not a permissible use of Rule 60(b).

In *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964), this Court refused to allow use of Rule 60(b) to gain relief from judgment on grounds that should have been raised on a previous direct appeal. In that case, the original District Court proceedings had resulted in an injunction against the Internal Revenue Service from collecting taxes for 1954 to 1956 from the plaintiff-taxpayer on the condition that the taxpayer not raise the statute of limitations as a defense in any subsequent proceedings concerning that tax. The taxpayer appealed the imposition of the condition that he waive his statute of limitations defense. The Internal Revenue Service, while defending the condition, did not raise the issue of whether the injunction itself was properly issued. This Court on appeal stated in dicta that it did not believe that the injunction was proper but that, as the issue had not been raised, it could not decide the case on this ground. Accordingly the decision of the District Court was modified to eliminate the condition but otherwise affirmed. Following this decision, the Internal Revenue Service sought to vacate the injunction under Rule 60(b) and the District Court granted the motion. The plaintiff then appealed and this Court held that the District Court had abused its discretion in allowing relief from judgment as neither Rule 60(b)(5) nor 60(b)(1) afforded the Government a basis for relief. As pointed out by this Court, Rule 60(b) was not intended as a substitute for a direct

appeal and in the interests of finality of judgment, the rule could not be used where the issue upon which relief was sought could have and should have been reviewed by a timely appeal. Accordingly, the District Court's grant of relief from judgment was reversed.

In the present case, there is even less reason to allow relief from judgment than there was in *Schildhaus*. There was no indication by this Court that the District Court erred in granting plaintiff a lump sum benefit. The reversal of the findings of the District Court as to part of the decision against plaintiff had no bearing on the form of plaintiff's recovery. Most importantly, the issue of the type of recovery plaintiff would receive, which clearly existed within the scope of the March 16, 1976 judgment, was not raised by plaintiff in his appeal from that judgment. Plaintiff cannot be permitted to rectify his failure to take a timely appeal by resort to Rule 60(b). *Schildhaus v. Moe, supra*, 335 F.2d at 530.

Plaintiff's misuse of Rule 60(b) is evident by his failure to bring himself within the terms of that rule. Rule 60(b) allows for relief from judgment only in certain special circumstances. As this Court recently stated, "[v]ery high among the interests in our jurisprudential system is that of finality of judgments", *United States v. Ciriame, supra*, 563 F.2d at 33, and judgments should not be disturbed except under the specific conditions described in Rule 60(b) or where there are extraordinary circumstances mandating relief from judgment in order to do justice.

In the present case, plaintiff simply cannot bring himself within the terms of Rule 60(b). He first alleges that the judgment granting plaintiff a lump sum benefit was based on a "mistake" under Rule 60(b)(1) which provides for relief if there is "mistake, inadvertance, surprise, or excusable neglect." Plaintiff claims that a mistake of law was made by the District Court. It is not at all clear that

Rule 60(b)(1) was meant to cover judicial error. See *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir.), *cert. denied*, 402 U.S. 1012 (1971); *Swam v. United States*, 327 F.2d 431 (7th Cir.), *cert. denied*, 379 U.S. 852 (1964); *Lapiczak v. Zaist*, 54 F.R.D. 546 (D. Vt. 1972). Some Circuits do allow Rule 60(b)(1) motions when there has been an intervening appellate decision which definitively overrules the reasoning used by the District Court in reaching its decision, but only when the motion for relief from judgment is made within the time ordinarily calculated for the filing of a notice of appeal. *D.C. Federation of Civic Association v. Volpe*, 520 F.2d 451 (D.C. Cir. 1975); *Oliver v. Home Indemnity Co.*, 470 F.2d 329 (5th Cir. 1972). The matter has not been definitively decided in the Second Circuit.*

In the present case, plaintiff cannot make use of even the most liberal interpretation of Rule 60(b)(1). In the first place, there has been no intervening appellate decision on the issue raised by plaintiff. In the second place, plaintiff did not move for relief from judgment within the time appropriate for appeal. There is no basis for plaintiff's claim that the judgment of this Court reversing in part and affirming in part the District Court's original decision is an intervening appellate decision mandating the granting of an annuity to plaintiff. The decision of this Court mandated payment of a lump-sum and did not address the issue of an annuity as that issue was not

* Although relief was allowed in *Tarkington v. United States Lines*, 222 F.2d 358 (2d Cir. 1955), following a definitive Supreme Court decision which would have mandated a different result, in *Schildhaus v. Moe*, *supra*, the Court stated that the decision in *Tarkington* was proper only because the motion for relief from judgment was filed within the time for appeal and was based on a Supreme Court decision. In such circumstances, the court held, judicial economy is served by allowing the motion to vacate as the appellate court is saved from having to review a case that could easily be properly decided by the District Court on the basis of the new decision.

raised by the plaintiff on appeal. It is clear that in such circumstances, where the time for direct appeal has lapsed, where the issue raised could have been but was not raised on direct appeal and where there is no intervening appellate decision, use of Rule 60(b)(1) is totally inappropriate. *Silk v. Sandoval, supra*; *Hoffman v. Celebrezze*, 405 F.2d 833 (8th Cir. 1969); *Schildhaus v. Moe, supra*; *Swam v. United States, supra*; *Lapiczak v. Zaist, supra*; *Loucke v. United States, supra*.

Plaintiff also contends that he is entitled to relief under Rule 60(b)(5), which provides for relief if it is no longer equitable that the judgment have prospective application. In *Ryan v. United States Lines Company*, 303 F.2d 430 431 (2d Cir. 1962), this Court stated that "Rule 60(b)-(5) which permits relief from a judgment on the ground that 'it is no longer equitable that the judgment should have prospective application' properly applies only to judgments with prospective effect, and so does not cover the case of a judgment for money damages". 303 F.2d at 343. Indeed, this application of Rule 60(b)(5) is the only one which makes sense as there is no prospective application in the case of a money judgment. In any event, it has not been shown that equity would be served by relieving plaintiff from any prospective effects of this judgment.

Finally, plaintiff seeks to bring himself within the terms of Rule 60(b)(6) which allows relief from judgment for any other reason justifying relief. This provision has been interpreted as a clause allowing the court to do justice in extraordinary circumstances. However, as stated by Professor Moore:

Absent exceptional and compelling circumstances, a party will not be granted relief from a judgment under clause (6) even though relief from the judgment might have been obtained had an appeal been taken . . .

7 Moore, *Federal Practice* ¶ 60.27[1] at 348 (2d ed. 1975). The cases in which relief has been allowed under this clause have been cases of truly exceptional circumstances where the petitioners, through a chain of unusual occurrences that were not of their own making, had little control over litigation which was decided adversely to them. For example, in *Klapprott v. United States*, 335 U.S. 601 (1949), a petitioner was relieved from a default judgment obtained by the United States depriving him of his citizenship while he was being held, improperly, in jail by the United States. In *United States v. Cirami*, *supra*, the petitioners had relied on counsel who was mentally ill and whose mental illness caused him to tell them that things had been done on their behalf in litigation which had, in fact, not been done. Rule 60 (b) (6) relief was appropriate in these cases because "allegations set up an extraordinary situation which cannot fairly or logically be classified as mere neglect on [their] part." *Klapprott v. United States*, *supra*, as quoted in *United States v. Cirami*, *supra*, 563 F.2d at 35. In the present case, there are no allegations of the types of extraordinary circumstances that have been held to justify relief under Rule 60(b) (6). Accordingly relief under Rule 60(b) (6) is also inappropriate.

3. The Order Denying Plaintiff's Motion to Vacate Was Correct

Plaintiff is appealing from the District Court's denial of his motion to vacate its March 16, 1976 judgment pursuant to Rule 60(b), F.R.Civ.P. This Court in *Daily Mirror v. New York Daily News, Inc.*, *supra*, 533 F.2d at 56, set forth the limits of review in an appeal from the denial of a motion for relief from judgment:

An order denying relief under Rule 60(b) is an appealable order, but the appeal brings up only the correctness of the order itself. *Hines v. Sea-*

board Air Line R.R. Co., 341 F.2d 229 (2d Cir. 1965); *Wagner v. United States*, 316 F.2d 871 (2d Cir. 1963). It does not permit the appellant to attack the underlying judgment for error that could have been complained of on direct appeal. *Sampson v. Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970); 9 J. Moore, *Federal Practice* ¶ 204.12[1] [2d ed. 1973]. Moreover, the denial of a motion to vacate will be reversed only upon a clear showing of an abuse of discretion, *Sampson v. Radio Corp. of America*, *supra*; *Hines v. Seaboard Airline R.R. Co.*, *supra*; *Wagner v. United States*, *supra* . . .

See also Pagan v. American Airlines, 534 F.2d 990, 992-93 (1st Cir. 1976); *Altman v. Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972). Thus, even if the present issue was appropriately raised in the District Court, the scope of this Court's review of the denial of that motion is extremely narrow, limited as it is to a determination of whether the trial judge clearly abused his discretion in denying the motion.

Although the merits of the District Court's original decision are not at issue here, defendants will briefly outline the applicable law with regard to the award of annuities or lump sum benefits to those who leave government service. Under the Civil Service retirement system federal employees have deducted from their basic pay a statutorily set percentage which is deposited in the Treasury of the United States to the credit of the Civil Service Retirement and Disability Fund. 5 U.S.C. §§ 8331(5), 8334(a)(1) and (2). The Federal Government contributes a matching sum to this fund. 5 U.S.C. §§ 8334(a)(1) and (2). A "lump-sum credit" within this retirement system refers to the "(A) retirement deductions made from the basic pay of an employee . . . ; (B) amounts deposited by an employee or member covering earlier

service; and (C) interest on the deductions and deposits. . . ." 5 U.S.C. § 8331(8). It does not include the Government's contributions. Upon retirement, the system provides the qualified employee, 5 U.S.C. § 8333, with at least two options—an annuity, 5 U.S.C. § 8336, calculated pursuant to a statutory formula, 5 U.S.C. § 8339, or a lump-sum benefit equal to the "lump-sum credit", 5 U.S.C. §§ 8331(8) and 8342(a). The statutory scheme specifically provides that: "The receipt of payment of the lump-sum credit by the individual voids all annuity rights under this subchapter . . ." 5 U.S.C. § 8342(a).

As the Government proved at the original trial of this matter, plaintiff applied for a lump-sum credit refund on a form provided to him by the Civil Service Commission. This form contains the following "Notice to the Applicant": "If you have more than 5 years of service, you may be entitled to annuity rights which will be forfeited by payment of this refund unless you are later re-employed subject to the Civil Service Retirement." As was also proven at trial, upon receipt of plaintiff's application for a lump-sum credit refund the Civil Service Commission paid over the amount credited to plaintiff's account in the Retirement and Disability Fund to the Postal Service in partial satisfaction of plaintiff's outstanding claimed liability to the Postal Service. This transfer of plaintiff's lump-sum credit to the Postal Service constituted a payment to the plaintiff because it reduced his liabilities to the Postal Service. It was as much a payment to him as if he had been given the money by the Civil Service Commission and had then paid his debt to the Postal Service with these funds.

The subsequent determination in this action that the plaintiff did not owe the full amount to the Postal Service which it claimed does not change the fact that the lump-sum credit was paid out of the Civil Service Retirement and Disability Fund at plaintiff's request. Plaintiff could

have elected an annuity rather than a lump-sum retirement benefit upon his retirement from the Postal Service, his debt to the Postal Service notwithstanding. Plaintiff had not committed a crime which deprived him of his annuity, 5 U.S.C. §§ 8312, 8314, 8315, and he could not have been and was not forced to elect a lump-sum benefit rather than an annuity.* Had plaintiff elected an annuity, the Postal Service would have been constrained to proceed against plaintiff through a civil action rather than by a set off, or the Service could have waited until plaintiff's annuity came due and sought recoupment at that point. Plaintiff's election of a lump-sum benefit over a retirement annuity was his own choice. Plaintiff's allegations that it was administratively more convenient for the Postal Service to have him elect a lump-sum benefit rather than an annuity have no bearing on the fact that the choice between the two benefits belonged to Stephens and was made by Stephens alone.

In an appeal from the denial of a Rule 60(b) motion, the appellant may not attack the merits of the underlying judgment. Likewise, Mr. Stephens cannot contest here the Postal Service's decision to grant him a lump sum benefit. Plaintiff's sole claim in this case, therefore, is that the decision of this Court which reversed the judgment against him mandated payment of an annuity rather than a lump-sum benefit when the case was remanded and that refusal to grant relief from judgment was therefore an abuse of discretion. This is clearly not the case. The decision of this Court in *Stephens v. United States*, Dkt. No. 76-6087 (2d Cir., Nov. 19, 1976), was that the District Court's original ruling was clearly er-

* Plaintiff claims he made a "mistake" in electing a lump-sum payment. This claim is belied by his attorney's demand for a lump sum payment in March of 1972. (Stipulation of Facts, ¶ 24, exhibit 17). There has never been any allegation that plaintiff was misled as to his rights.

roneous as to six of the parcels the court found stolen from the post office by plaintiff but not clearly erroneous as to five of the parcels. Accordingly, the case was remanded to the District Court with directions "to enter a net judgment in favor of Plaintiff-Appellant Stephens in the amount of \$3,074 plus costs."* Upon remand, the District Court complied fully with the mandate of this Court and entered judgment for plaintiff in the amount of \$3,074. Plaintiff claims that the reversal in the Court of Appeals as to certain findings in favor of the Government required the District Court to grant him an annuity. However, the decision of this Court contains absolutely nothing which mandates such a result. In fact, the plain language of that decision mandates the grant to Stephens of a lump-sum benefit in the amount of \$3,074. The award of \$3,074 was made to the Plaintiff by the District Court in its judgment of July 27, 1977, a judgment which, ironically, plaintiff did not appeal.

There has clearly been no abuse of discretion in the District Court's refusal to vacate its judgment awarding plaintiff a lump sum retirement benefit. Accordingly, the denial of plaintiff's motion for relief from judgment should be affirmed.

* As pointed out at p. 6, *supra*, if plaintiff believed that this Court misunderstood his claims for relief, his remedy was a petition for a rehearing pursuant to Rule 40 F.R.App.P.

CONCLUSION

For the foregoing reasons, the denial of plaintiff-appellant's motion to vacate should be affirmed.

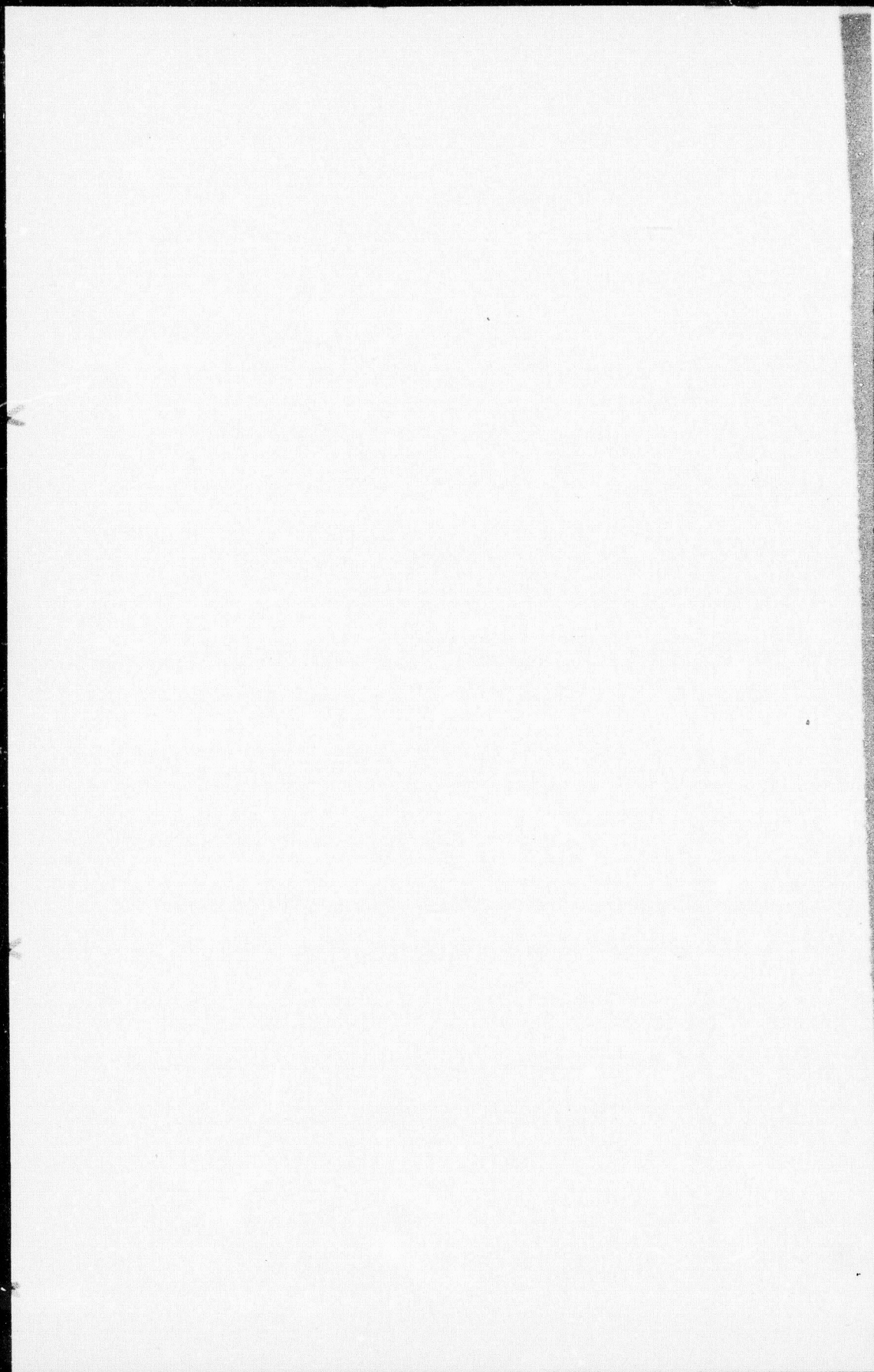
Dated: New York, New York
January 30, 1978

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.*

SHERRY J. LEIWANT,
Special Assistant United States Attorney,
PATRICK H. BARTH,
*Assistant United States Attorney,
Of Counsel.*

ADDENDUM



Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK,

73 Civ. 1559 (TPG)

No. 77,982

JESSE B. STEPHENS,

Plaintiff,

—v.—

UNITED STATES OF AMERICA; UNITED STATES POSTAL SERVICE; E. THEODORE KLASSEN, in his capacity as Postmaster General of the United States; UNITED STATES CIVIL SERVICE COMMISSION; ROBERT E. HAMPTON, in his capacity as Chairman of the United States Civil Service Commission; and ELMER B. STAATS, in his capacity as Comptroller General of the United States,

Defendants.

This Court having tried this action and having rendered a decision that the plaintiff was entitled to the sum of \$7,533.00 on his claim against the United States Postal Service, and that the defendant United States Postal Service was entitled to the sum of \$7,620.00 on its counterclaim against the plaintiff; and this Court having entered judgment for the defendant United States Postal Service on March 15, 1976 in net amount of \$87.00; and an appeal from the judgment of this Court having been taken to the United States Court of Appeals for the Second Circuit; and the Court of Appeals having filed

Judgment

its decision on November 19, 1976 affirming the decision of this Court in part and reversing the decision of this Court in part; and the Court of Appeals having remanded this case to this Court with directions to enter a net judgment in favor of plaintiff in the amount of \$3,074.00, it is therefore hereby

ORDERED AND ADJUDGED, that plaintiff shall have judgment against the defendant United States Postal Service in the net amount of \$3,074.00, plus plaintiff's costs to be taxed by the Clerk of the Court.

Dated: New York, New York
July 27, 1977.

.....
THOMAS P. GRIESA
United States District Judge

Judgment Entered: 8/1/77

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Sherry J. Leiwant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 30th day of January 1978 s/he served two copies of the Appellee's Brief ~~encl~~ ~~copy~~ within

by placing the same in a properly postpaid franked envelope addressed:

Ian F. Feldman
The Legal Aid Society
1029 East 163rd Street
Bronx, New York 10459

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

30th day of January, 19 78

Pauline J. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 81-4032331
Qualified in New York County
Commission Expires March 30, 1978